

STATE OF MICHIGAN
COURT OF APPEALS

BENJAMIN ISRAEL SACHS, Personal
Representative of the Estate of JANIS
CHERNOFF SACHS,

UNPUBLISHED
September 20, 2007

Plaintiff-Appellee,

v

SINAI HOSPITAL OF GREATER DETROIT,
a/k/a SINAI HOSPITAL and DETROIT
MEDICAL CENTER,

No. 270321
Wayne Circuit Court
LC No. 99-929550-NH

Defendants-Appellants.

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

In this medical malpractice case involving the statute of limitations, defendants Sinai Hospital of Greater Detroit, a/k/a Sinai Grace Hospital (“Sinai Hospital”), and Detroit Medical Center (“DMC”) appeal by leave granted from an order denying their motion for summary disposition. We affirm.

Defendants argue that the trial court erred in denying their motion for summary disposition. They contend that in light of the retroactive application of *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), plaintiff’s¹ medical malpractice claims were barred by the statute of limitations and the notice of intent did not operate to toll the applicable period for filing the action. However, we find that the law of the case precludes application of *Waltz* in this case.

We review de novo whether the law of the case doctrine applies in a given matter. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Under the law of the case doctrine, an appellate court’s decision on a particular issue binds both the trial courts and other appellate panels in subsequent appeals of the case. *Grievance Administrator v Lopatin*, 462

¹ Plaintiff, who is the decedent’s son, is the successor personal representative to the estate. Audrey Chernoff, who was the decedent’s sister, was originally appointed as personal representative on April 23, 1997. However, she died in 2003.

Mich 235, 260; 612 NW2d 120 (2000). The law of the case applies to issues actually decided, either implicitly or explicitly, in the prior appeal. *Id.* An exception to the application of the law of the case is invoked where there has been an intervening change in the law. *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995).

In this case, the dispute over the statute of limitations issue stems primarily from the following footnote in this Court's opinion in an earlier appeal in this case:

Ordinarily, the statute of limitations would have expired on April 23, 1999, or two years after [Chernoff] was first appointed personal representative. Because [Chernoff] filed a notice of intent on April 16, 1999, the limitation period was tolled under MCL 600.5856(d) until September 24, 1999. [*Chernoff v Sinai Hosp of Greater Detroit* (“*Chernoff I*”), unpublished opinion per curiam of the Court of Appeals, issued March 22, 2002 (Docket No. 228014, slip op at 1 n 1).]

The *Chernoff I* Court also concluded, “The pivotal issue presented is whether a plaintiff can have reasonable belief in his or her authority to file suit as a personal representative when the estate is closed and the letters of authority have expired.” *Id.*, slip op at 2. For the *Chernoff I* Court to decide whether Chernoff had authority to file the complaint, it also had to determine if the statute of limitations had expired. Deciding whether Chernoff had the authority to file suit without first concluding that the suit was timely would have rendered the *Chernoff I* decision meaningless to plaintiff. Stated otherwise, had the *Chernoff I* Court initially concluded that the statute of limitations expired under MCL 600.5856(d), whether Chernoff had authority to file suit would have been a moot issue. Accordingly, the question whether the cause of action was timely was implicitly decided in *Chernoff I* in plaintiff's favor. Consequently, under the law of the case, the *Chernoff I* panel's holding on this issue is binding on both the trial court and subsequent appellate panels. *Lopatin, supra* at 260.

Defendants argue that the law of the case does not apply in this case because our Supreme Court's decision in *Waltz* constituted an intervening change in the law. We disagree. After this Court affirmed the trial court's order denying defendants' motion for summary disposition on the ground that Chernoff had the authority to act as the personal representative of decedent's estate, our Supreme Court released its decision in *Waltz*. In *Waltz*, our Supreme Court determined that MCL 600.5856(d) does not toll the additional period permitted under MCL 600.5852 for filing wrongful death actions. *Waltz, supra* at 655. However, in *Ousley v McLaren*, 264 Mich App 486, 494-495; 691 NW2d 817 (2004), in the course of determining that *Waltz* applied retroactively, this Court concluded that *Waltz* did not represent a change in the law.² Accordingly, this exception to the application of the law of the case does not apply.

² Specifically, the *Ousley* Court noted that *Waltz* overruled “confusing and imprecise dicta” in *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 117 (2000), not “clear and uncontradicted case law.” *Ousley, supra* at 494-495. In addition, the *Ousley* Court concluded,

[T]o the extent that *Waltz* decided an issue of first impression in deciding that § 5856(d) does not toll § 5852, that resolution was “clearly foreshadowed,” if

(continued...)

Further, the law of the case applies “without regard to the correctness of the prior determination.” *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). Therefore, because this Court determined in *Chernoff I* that plaintiff’s suit was timely, this decision is the law of the case, without regard to its correctness in light of our Supreme Court’s later opinion in *Waltz*. In addition, because the *Chernoff I* panel’s decision is the law of the case, we will not reevaluate whether plaintiff filed the medical malpractice claims within the applicable period. Accordingly, we need not consider defendants’ remaining issues on appeal.

Affirmed.

/s/ Donald S. Owens

/s/ Helene N. White

/s/ Christopher M. Murray

(...continued)

not actually determined, by the previous decision holding that § 5852 is a saving provision, not a statute of limitations or repose. [*Id.* at 495.]